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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

ELAINE RENEE BURKE,

Defendant and Appellant.

F062756

(Super. Ct. No. F10800489)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Fresno County. Arlan L. Harrell, Judge.

Allison H. Ting, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

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\* Before Dawson, Acting P.J., Poochigian, J., and Franson, J.



## STATEMENT OF THE CASE

On March 7, 2011, a second amended information was filed against appellant, Elaine Renee Burke, alleging that she committed a misdemeanor petty theft (Pen. Code, § 484, subd. (a), count one)<sup>1</sup> and a felonious second degree commercial burglary (§§ 459, 460, subd. (b), count two). The information further alleged Burke had two prior prison terms within the meaning of section 667.5, subdivision (b).

The trial court conducted an Evidence Code section 402 hearing at the beginning of a jury trial, finding one statement to the arresting officer admissible and excluding another statement. The court denied a defense motion to exclude a videotape taken of Burke while she was in the commercial establishment. In a bifurcated proceeding, Burke waived her rights and admitted both prior prison term enhancements.

On May 27, 2011, the court sentenced Burke to prison for the upper term of three years on count two and a consecutive term of one year for one prior prison term enhancement for a total prison sentence of four years. The court imposed a restitution fine and two days of actual custody credit and two days of conduct credits. Burke filed a timely notice of appeal.

Burke's counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). After review of the record, we affirm the judgment.

## FACTS

### *Evidence Code Section 402 Hearing*

Outside of the jury's presence, Selma Police Officer Lance Pearce testified that on August 12, 2010, at 7:25 p.m., he conducted a traffic stop of a Ford Explorer in a Carl's Jr. parking lot. Pearce saw five full Walmart bags in the rear hatchback area. Ms.

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<sup>1</sup> Unless otherwise noted, all statutory references are to the Penal Code.



Tolliver was driving, Burke was in the front passenger seat, and Devon McMillian and Tracy McMillan were sitting in the back seats.<sup>2</sup>

Pearce told the occupants of the vehicle that he stopped them because they matched the description of subjects who were seen leaving Walmart and were reportedly involved in a theft. When Pearce asked Burke if she had purchased the items in the bags, she replied, “no.” Devon McMillian, Tracy McMillan and Tolliver also said they had not purchased the items. All of the occupants of the vehicle also denied placing any of the items in the vehicle. Tolliver gave Pearce permission to look in the back of the vehicle and to remove the items.

As Burke exited the front passenger seat, Pearce saw a stack of unused Walmart bags that were at Burke’s feet next to her purse. When Burke exited the vehicle, she was placed in handcuffs, told she was being detained, and then placed in a patrol car. Pearce asked everyone if they had receipts for the Walmart merchandise. Everyone replied that they did not have receipts. Burke was in custody when she answered this question.

Pearce collected identifications and learned that there was an outstanding warrant for Burke’s arrest. Pearce then informed Burke that she was being arrested. At the police department, the occupants of the vehicle were advised of their rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). Burke exercised her right to remain silent.

The court ruled that Burke’s response to Pearce’s initial inquiry about whether purchases were made at Walmart after he stopped the vehicle was admissible because Burke was not yet in custody. The court found these initial statements by Burke and the other occupants were admissible. The court ruled that Burke’s statement that she did not have receipts for the items in the car was not admissible because Burke was in custody, handcuffed, and had not been advised of her *Miranda* rights.

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<sup>2</sup> Tracy McMillan and Devon McMillian are sister and brother, but their last names are spelled differently.



### ***Trial Testimony***

On August 12, 2010, Juan Cruz was working at Walmart in Selma as a loss prevention officer. Cruz saw two females and one male at 6:15 p.m. in the house, home body accessory section of the store with large purses. They were looking around nervously. Their carts were filled with many high-priced items. Cruz stepped back into another aisle and watched the defendants through the holes in the pegboard between aisles.

Tracy McMillan went to the infants' aisle. Cruz followed Burke toward the electronics section because she had more items in her cart than did the others. In the electronics section of the store, Burke pulled hand-held cordless phones from their boxes, put them back in their boxes, and placed a phone into her cart. Tracy McMillan joined Burke and also selected a phone. Referring to Cruz, Burke said, "If this Mexican don't stop following me, he's going to get himself shot."

Burke met with Devon McMillian in the curtain aisle and they began to conceal items in Walmart bags that Burke took out of her purse. Cruz was watching this activity from the greeting card section, about 50 feet away. Devon McMillian took the loaded bags to the garden area and walked outside with them, without making any attempt to pay for the merchandise. The two women kept their carts that still had some merchandise.

Cruz followed Burke to the sporting goods section. Burke removed additional Walmart bags from her purse and began to conceal more items in them. Devon McMillian returned, joined Burke, and helped her conceal more merchandise in the shopping bags. Devon McMillian left the store with the additional bags through the garden exit and went to a black SUV. No one had permission to take items from the store without paying for them. Cruz called the police department.

When the property was later returned, the store manager scanned the stolen items to determine the value. The pre-tax value of the items was \$742.42. The store had a video surveillance system that is constantly running. Cruz later reviewed the videotape. Burke, Devon McMillian and Tracy McMillan were visible on the videotape in the



departments, sections, and aisles of the store where Cruz had seen them. Photographs made from the videotape depicting the defendants' conduct were received into evidence.

Officer Pearce testified at trial just as he had in the Evidence Code section 402 hearing. Pearce, however, did not testify as to Burke's statement after detention that she did not have receipts. All four occupants of the SUV said they did not pay for the merchandise and denied placing it into the SUV. Pearce turned the stolen merchandise over to another officer who took it back to Walmart.

### **APPELLATE COURT REVIEW**

Burke's appointed appellate counsel has filed an opening brief that summarizes the pertinent facts, raises no issues, and requests this court to review the record independently. (*Wende, supra*, 25 Cal.3d 436.) The opening brief also includes the declaration of appellate counsel indicating that appellant was advised she could file her own brief with this court. By letter on October 18, 2011, we invited appellant to submit additional briefing. To date, she has not done so.

After independent review of the record, we have concluded there are no reasonably arguable legal or factual issues.

### **DISPOSITION**

The judgment is affirmed.